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IN THE

United States Supreme Court

OCTOBER TERM, 1897.

No. .....

AMEDEE D. MORAN ET AL., Petitioners,

versus

CHARLES DILLINGHAM, Respondent.

Brief for Petitioners in Support of Their Application for Certiorari.

We find that we have presented in our petition the question of Judge Pardee's disqualification in rather a hasty manner and have probably taken too much for granted, and may have failed to make ourselves clear on that point, hence the argument. The statute provides (italics ours): "That n

ustice or judge before whom a *cause* or *question* may have been tried in the district court or existing Circuit Court shall it at the trial or hearing of such *cause* or *question* in the Circuit Court of Appeals." If he tried the "cause" or if he ried the "question" below he is recused above. Mark, it oes not say entered the particular order, judgment or deree appealed from. The word "cause" as used in the statte doubtless means "case," as these terms are frequently nd generally used interchangeably. A "case" is defined to e "a state of facts which furnishes occasion for the exercise f the jurisdiction of a court of justice." "A question conested before a court of justice; an action or suit in law or quity." "An action, suit or cause." (Anderson, Law Dec., p. 52.)

"Question" is defined thus: "Subject of inquiry; a matter nder examination or discussion. May be of pure fact, of ure law, or both of fact and law; in the last case constitutng a mixed question." Same, p. 851.

Bearing in mind the above definitions, let us turn our attention to the causes and questions tried by Judge Pardee at ircuit in the cause and receivership out of which the apeal was taken.

1. Judge Pardee appointed Mr. Dillingham receiver. (R. 7.) And thereby was tried before him directly the right, ower and authority of Dillingham to retain possession of ll the property of the railway company until the further orer of the Court, and incidentally to receive such compensaon as may be allowed him by the court.

2. Judge Pardee entered the order of December 4, 1886, utting Mr. Dillingham on the pay rolls at $150.00 per onth "to date from the possession of the receivers and to

continue while Mr. Dillingham gives his personal attentio to the business of the company, or until the further order o the court." (R. p. 7.) And thereby was tried and detei mined by Judge Pardee, the "cause" and "question" (1) a to whether Mr. Dillingham was entitled to compensation (2) the value of his services; (3) when it should be gin; (4) when it should end and under what circumstan ces and by what authority, and (5) what services he was t perform to earn this allowance. Among other questions (a stated above) tried by Judge Pardee and determined by th above order was as to how long it should continue. Judg Pardee decided that it should continue while he "gives hi personal attention to the business of the company or unti the further order of the court." Turn now to the opinion o the Circuit Court of Appeals. The main feature of th opinion is the consideration of the contingencies named i the order. That is, whether Dillingham *was* giving "hi personal attention to the business of the company," whethe "the Court had otherwise ordered" that he should draw thi allowance, and whether Mr. Dillingham was entitled to th $150.00 per month so long as he continued to give his per sonal attention to the business of the company, or until i was otherwise ordered. The opinion starts out by quotin the order of December 4, 1886, as a sort of text, and afte quoting certain other and subsequent orders entered by Judge Pardee, we find this language: "Dillingham contin ued to act as receiver up to April, 1895, apparently from th record attending to such matters as were necessary," etc. Th opinion proceeds: "And yet after the receiver had proceede until 1895 with all the responsibilities, obligations and dutie upon him," etc. And on the other contingency, that is whether the order had been abrogated, the court finds as

fact that it had not. These are the questions of fact that Judge Pardee had to anticipate and consider prospectively to enter the order of December 4, 1886. The same questions of fact were considered by the Circuit Court of Appeals retrospectively, and after reviewing those facts and having concluded that Dillingham had during the period in question given "his personal attention to the business," ordered and adjudged that he was entitled to the allowance of $150 per month during the period in question and that our objections thereto should be overruled and discharged. The conclusion comes naturally that precisely the same "questions" were retried on appeal that were of necessity tried by Judge Pardee when he entered the order. To adjudge the allowance at Circuit in advance the same set of "questions" were not only of necessity required to be considered, but were in fact actually considered when this allowance was restored to Dillingham on appeal.

3. Judge Pardee entered the final decree of foreclosure. (R. p. 8.) It is by the second paragraph of the eighteenth article of this decree that these petitioners are adjudged to pay "the compensation of the receivers and their solicitors." (R. p. 19.) Thereby Judge Pardee at Circuit entered a decree against these petitioners and in favor of Mr. Dillingham for all such sums of money as might be due him as his fees and charges as receiver. And as necessarily incident thereto he tried and determined the question as to how and when this was to be paid and whether it could be adjusted between the parties by agreement, compromise or otherwise.

4. Special Master Winter, appointed by Judge Pardee, under a reference made to him by the terms of the final decree, heard the petitions and claims for allowance and reported to

the court that Dillingham's claim, among others, "had bee adjusted with the purchasing committee," meaning these p titioners. This report, by rule of the court, stood confirme after thirty days.

5. Judge Pardee entered the order of August 28, 189 which was entered a few days after the compromise and ac justment of the claims for compensation with these pet tioners and which ordered the receivers to deliver possessio of the property to these petitioners. And thereby was trie and incidentally determined the question whether the clain had been paid or adjusted, or if not how this would be don and in addition thereto the court held by this order jurisdic tion over the lots and land not sold for administration an until the further order of the court.

6. Judge Pardee entered the order of November 4, 189 which was a substantial re-enactment of the order of August 2 with a few slight modifications not important to this case.

7. In Judge Pardee's court was filed on December 1 1892, a report of Dillingham and Winter, master commi sioners, appointed by Judge Pardee to sell the propert showing that the $20,000.00 had been paid to Dillingha and they refer to it as the "agreement." And this repo stood confirmed under rule of the court. (R. p. 187 and 189

The foregoing shows that Judge Pardee practically di posed of the whole "cause," or "case," at Circuit, and th every order made by him either directly or incidentally af fected or "tried" the "question" of Dillingham's compens tion as receiver. These matters alone, would, it seems, recus Judge Pardee from sitting on appeal on any "cause" o "question" going to the appellate court, out of said cas

which involved the "question" of Dillingham's rights under the order of December 4th, 1886; or under the final decree of foreclosure, which made provision for his final compensation, or which affected the rights of these petitioners, who were adjudged to pay and settle Dillingham's final compensation, or which involved the rights and liabilities of either of the parties under the subsequent orders made by Judge Gardee.

The language of the act of 1891, creating the Circuit Court of Appeals, is taken from the Judiciary Act of 1789. The statute was made necessary by the peculiar features of the Federal Judiciary system so as to insure to all litigants the right of review of all "causes" and all "questions" by a different judge from the judge who tried the "cause" or question" in the court below. Without some such provision, the right of appeal from one mind to another would in measure be defeated. The language is apt and well chosen. Under its terms a judge may be recused though he had never made an order of any kind in the particular case appealed. This may be well illustrated in an imaginary case: A suit in ejectment is filed on the law side at Circuit to recover a tract of land. Defendant answers, claiming the land by a purely equitable title, and asserts that plaintiff's claim is a cloud on his title, and files a suit on the equity side to remove cloud and to enjoin the suit at law until his equity suit may be disposed of. Could the justice or judge who tried the equity case at circuit sit in the law case on appeal? Could the justice or judge who tried the law case at circuit sit in the equity case on appeal, granting that he has made no order of any description in the particular case appealed? We think not. Why? Because, while he made no order and did not try technically the case ap-

pealed, he did try at circuit the same "cause" and the same "question," that is, who was the owner of the land in dispute? And Judge Pardee having tried the question as to who was the owner of the $150.00 per month in dispute in this case while at circuit, he of necessity retried this "cause" and "question" on appeal. No other cause or question exists, or can exist, in this case than the one question as to who owns the money in controversy. A justice or judge who once tries that question between the parties below, is forever barred by the statute from trying it on appeal.

The foregoing argument is made without reaching the point raised in the case of American Construction Co. vs. Jacksonville, T. K. & W. Ry. Co., 148 U. S. 372. But the precise question raised and decided in that case is raised here. The decree appealed from in this case abrogated and set aside the order of December 4th, 1886, made by Judge Pardee at circuit. Judge Pardee, sitting in the case on appeal, revoked the decree of the Circuit Court, and reinstated his own former order, made at circuit. This is the same thing, substantially, that occurred in the case above mentioned. On this subject, this court say in that case:

"The more important suggestion is that the decree of the Circuit Court of Appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by Section 3 of the Judiciary Act of 1891, which provides that 'No justice or judge before whom a cause or question may have been tried or heard,' in the Circuit Court, 'shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.' 26 St. p. 827. The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from

is own order, but from an order setting aside his order, is novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari. U. S. vs. Lancaster, 5 Wheat 434; U. S. vs. Emolt, 105 U. S. 414; Queen vs. Justice of Hertfordshire, 6 Q. B. 753; Oakley vs. Aspinwall, 3 N. Y. 547; Tolland vs. Commissioners, 13 Gray 12."

And upon the ground that Judge Pardee was recused in that case, this court granted the writ of certiorari. Our application presents much stronger grounds than existed in that case. This sufficiently appears from what is said above. In the above case it seems that Judge Pardee had entered but one order in the Circuit Court, whereas in this case he entered practically every order made in the case, from start to finish. We call attention to what we say on this subject in our application, pages 1 to 12, and particularly to our letter to Judge Pardee, page 5, and our motion to set aside submission, page 6, and his reply, page 8. Judge Pardee's letter shows his views to be that as he did not enter the particular order appealed from, he was not recused. He says: "As a matter of strict law, both Judge McCormick and I are qualified, * * for neither of us participated in the rendition of the decree appealed from." Judge Pardee's conclusion might be right if his understanding of the law is right. But we do not understand the statute to say anything about the decision appealed from. If Judge Pardee is right, he could have tried our exceptions on the merits in the Circuit Court and granted a new trial, and when they

were tried a second time by some other judge and an ap
taken, Judge Pardee could sit in the case on appeal.
such a case he had not "participated in the decree appea
from." But he had tried the "cause" or "question" in
court below, and would, we think, be recused under
statute and decisions of this court.

In the American Construction Co. case Judge Pardee h
not participated in the rendition of the decree appea
from.

We call attention to the argument of the merits of
case on pages 12 to 66 in our petition. We there try
show, and hope we have shown, that the Circuit Court
Appeals in setting aside the decree of the Circuit Co
based as it is upon the report of a master which is suppor
by a preponderance of the evidence, is destructive of s
modes of trial and in defiance and destructive of the law
announced by this court in numerous decisions, and by
courts where equity practice is known. That argumen
made not only as a basis for the writ, but to show that
application is supported by merit, and is not made mer
to demonstrate that Judge Pardee is recused.

We call attention to the decision of the Circuit Court
Appeals (R. p. ——). It is clearly a final disposition of
objections, and not merely a reversal.

Respectfully submitted,

L. W. CAMPBELL,

Solicitor for Petitioners, Amedee D. Moran et al

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 243.

AMEDEE D. MORAN ET AL., PURCHASING TRUSTEES, PETITIONERS,

versus

CHARLES DILLINGHAM, RESPONDENT.

BRIEF FOR PETITIONERS.

On April 4, 1885, on the application of Morgan's Louisiana and Texas Railroad and Steamship Company, the complainant in equity cause No. 21, of said company against The Texas Central Railway Company, in the United States circuit court for the northern district of Texas, at Waco, the Hon. Don A. Pardee, circuit judge, appointed Benj. G. Clarke and Charles Dillingham receivers of the railway properties belonging to said Texas Central Railway Company (order appointing receivers, R., p. 3). Said receivers, having qualified, entered upon the performance of their duties, and on or about December 4, 1886, respondent Dillingham petitioned said court to make him an allowance

for his services, to be paid out of the current revenues coming into the hands of the receivers; which petition having been presented to Hon. Don A. Pardee, the following order was entered:

"On considering the foregoing petition, it is ordered by the court that the receivers be authorized and directed to place Charles Dillingham on the pay-rolls of the receivers for the sum of one hundred and fifty dollars per month as an allowance upon his compensation as receiver in this cause. This allowance to date from the possession of the receivers and to continue while Mr. Dillingham gives his personal attention to the business of the company, or until the further order of the court" (R., p. 6).

The cause remaining on the docket of said court, and having been subsequently consolidated with another cause, known as the Farmers' Loan and Trust Company *vs.* Texas Central Railway Company, No. 33, a final decree of foreclosure was entered in said consolidated cause on April 12, 1887, before the Hon. Don A. Pardee, circuit judge. (See final decree, R., pp. 7 to 17.)

The property, having been offered for sale under the terms of said final decree, was purchased by petitioners, as purchasing trustees, representing the first-mortgage bondholders, and afterwards they made application to said circuit court for possession of the property purchased by them; which petition having been presented to the Hon. Don A. Pardee, an order was entered thereon on August 28, 1891, by said circuit judge. (See petition and order, R., pp. 18 to 22.)

A further petition was presented to said court by these petitioners to modify the decree dated August 28, 1891, which having been presented to the Hon. Don A. Pardee, an order was entered thereon on November 4, 1891, by said judge (R., pp. 24 to 27).

The property so purchased by these petitioners having been delivered to them under the terms of the final decree, the said Dillingham, not having been formally discharged

from his trust, thereafter filed his reports from time to time before the then master, Jno. G. Winter, and these petitioners, as purchasing trustees, appeared before said master from and after April, 1893, and objected to the items of $150 per month, charged by the respondent as his compensation, after the sale and delivery of the property. These exceptions were urged from time to time after said date as the reports came in, until said master, Winter, filed his reports on the receiver's accounts, allowing to said respondent the sum of one hundred and fifty dollars per month, after such sale and delivery, so claimed by him under said order, as shown by said special master's reports (R., pp. 123 to 138). The reports having been filed with the clerk of the court, on to wit, April 8, 1895, these petitioners followed up the contest and filed exceptions thereto in court (R., pp. 27 to 31); which exceptions and the reports of Master Winter were on the same day re-referred to Abner S. Lathrop, Esq., the standing master (R., p. 28). These petitioners filed amended exceptions to the receiver's account before Master Lathrop (R., pp. 29 to 31). After said re-reference, Master Lathrop heard the parties and filed his report on September 26, 1896 (R., pp. 146 to 148), and among other things he finds (R., p. 147):

"I consider from the testimony that the compromise made in September, 1891, allowing C. Dillingham, receiver, $20,000, was intended as revoking the order of December 4th, 1886, allowing him $150 per month, and was intended as full compensation for the services up to the time the receivership terminated. Since turning over the rolls, etc., to the purchasing trustees, the duties and labor of the receiver, as appears from the evidence, have not been arduous, and such services were contemplated when the fee of $20,000 was paid in. All the other parties to whom allowances were made so considered it, and they have made no further charge, except Special Master Winter, who was by special agreement allowed a further small compensation."

Master Lathrop recommends by the report that the objections to the receiver's reports, wherein he has retained

the $150 per month from April, 1893, up to April 8, 1895, be sustained, and that the said Dillingham be ordered to pay into the registry of the court the following amounts:

For 1893, nine months	$1,350 00
For 1894, twelve months	1,800 00
For 1895, three months	450 00
Total	$3,600 00

Upon the coming in of the report Dillingham filed exceptions thereto (R., pp. 148 to 150). The said exceptions and the master's report coming on to be heard before Hon. Charles Swayne, one of the district judges, presiding, said report was in all things confirmed, and respondent was ordered to at once pay into the registry of the court the said sum of $3,600 (R., p. 150); from which decree Dillingham appealed to the circuit court of appeals of the fifth circuit, and the cause was submitted on oral arguments and printed briefs for both parties, and was heard by the Hon. Don A. Pardee, presiding judge, and Hon. William T. Newman, district judge. (See opinion, R., p. 163.) After the cause had been submitted, and after petitioners' counsel returned from New Orleans to his home in Waco, Texas, he prepared a motion to set aside the submission of the cause on the ground that Judge Pardee was recused, and sent said motion to the clerk, and at the same time wrote Judge Pardee a letter in reference to the motion, which letter, motion, and Judge Pardee's reply thereto are as follows:

CHAS. DILLINGHAM
vs.
AMEDEE D. MORAN ET AL. } No. 556.

WACO, TEXAS, 5, 5, '97.

Hon. DON A. PARDEE, *New Orleans, La.*

DEAR SIR: When the above-entitled cause was taken on submission the other day by you and Judge Newman, I had

not investigated the question of your disqualification, but since arriving home I have to some extent investigated the question in reference to the record, and I believe you are disqualified under the statute. I would not like to have that question involved in the case, as it would cause considerable delay and expense, and as the other cause, which is really a companion case to this one, which involves the right to the surplus fund in court, is set down for the 2d of June, I would prefer that you would set aside the submission in this case, and let it be submitted at the time the other cases come up in which you and Judge McCormick are recused.

I would have made the suggestion at the time the case was submitted, but I had never investigated a question of this kind. I feel that it is my duty to advise you of my views on this subject before the case is decided. I have prepared a motion to set aside the submission, and sent the same to the clerk. I may be in error in regard to this, and have been at a loss to know how to reach the point, but have concluded that it is my duty, as stated above, to advise you of my views before a decision is reached.

Yours truly, L. W. CAMPBELL.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

CHARLES DILLINGHAM, *Receiver, Appellant,*
versus
AMEDEE D. MORAN ET AL., *as Purchasing Trustees, etc., Appellees.* } No. 556.

Appeal from the United States Circuit Court, Northern District of Texas.

Now at this time come Amedee D. Moran, Cornelius B. Gold, and Henry K. McHarg, purchasing trustees, and move this honorable court to set aside the submission heretofore entered in the above-entitled cause, and to set the

same down for submission at a future day of this term for the following reasons, to wit:

Because this case was taken on submission by Hon. Don A. Pardee, presiding judge of this court, and Hon. William T. Newman, one of the district judges of this circuit, sitting with the presiding judge, constituting the court at which said submission was received, and appellees, after argument and submission, upon a re-examination of the record in the above-entitled cause and the judiciary act and the decisions construing the same, are advised that the Hon. Don A. Pardee is recused and disqualified from sitting in this cause on the following grounds, to wit: (1) While sitting at circuit, as is shown by the record in this cause, he entered the order appointing the receiver, Charles Dillingham; (2) fixed the compensation and allowance as receiver by the order of December 4, 1886; (3) entered the final decree in this cause; (4) entered the order of confirmation; (5) entered the order of August 28, 1891, in this cause, and (6) entered the order of November 4, 1891, in this cause; that said orders were entered upon petitions, as shown by the record in this cause, and which of necessity required the judge, in passing upon the petitions and entering the orders, to decide the question of compensation of the receiver, Dillingham, and as to how long it should continue and for what services it would cover, which was the same question (and in the same case) decided in the lower court, and which is brought to this court for review, as is shown by the record in this cause; that counsel representing appellees neither at the time of argument nor prior thereto had investigated the authorities with a view of determining this question, and was therefore not advised in the premises, and for this reason did not make the suggestion as to disqualification at the time.

Respectfully submitted.

L. W. CAMPBELL,
Solicitor for Moran, Gold, and Henry K. McHarg, Appellees.

UNITED STATES CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, AT CHAMBERS—DON A. PARDEE, JUDGE.

NEW ORLEANS, LA., *May* 7, 1897.

L. W. CAMPBELL, Esq.,

General Attorney Texas Central Railroad, Waco, Texas.

DEAR SIR: I have your letter of the 5th instant and note the contents. As a matter of strict law, both Judge McCormick and I are qualified to sit in the case of Dillingham *vs.* Moran, for neither of us participated in the rendition of the decree appealed from. Whether Judge McCormick is disqualified in the case of Morgan's Louisiana & Texas Railroad *vs.* Moran, continued over for a full bench, I cannot say; but I am reasonably clear that strictly I am not recusable in that case.

For some time and because it would not delay business, both Judge McCormick and I have been in the habit of declining to sit in any cases of appeal wherein we have made former orders. When it comes, however, to embarrassing the business of the court by declining to participate, my impression is that we shall modify the habit.

Very respectfully yours, DON A. PARDEE.

At the same time said letter was sent to Judge Pardee, the motion to set aside the submission was mailed to the clerk by letter as follows:

WACO, TEXAS, 5, 5, '97.

J. M. MCKEE, Esq., *New Orleans, La.*

DEAR SIR: I enclose you herewith motion in case No. 556, Dillingham *vs.* Moran, which was submitted before Judges Pardee and Newman. This motion is to set aside the submission on the ground that Judge Pardee is recused. I have written Judge Pardee on the subject of this motion. I wish you would file same and call Judge Pardee's attention to it. I do not wish to argue the motion. I will send Judge

Clark's acceptance of service of the motion by succeeding mail, so it will not be necessary for you to have him served. If such motions as these are required under the rules to be printed, I wish you would have it done for me and send me the bill.

Yours truly, L. W. CAMPBELL.

(See petition for certiorari, pp. 4 to 9.)

Judge Pardee in his letter having stated that he was not recused, no further action was taken on the part of these petitioners, and afterwards, on, to wit, the 23d day of June, 1897, the opinion was delivered in said cause, reversing the decree appealed from, directing that the exceptions of these petitioners to the accounts of said Dillingham should be overruled. The case is here on certiorari.

The writ was prayed for, first, upon the ground that Judge Pardee was recused, and, second, upon the ground that the decree of the circuit court of appeals reversing the decree of the lower court is erroneous in that the decree appealed from should have been affirmed, and that that court in reversing the circuit court practically nullified the well-established rule of this court that a master's report of the facts will not be disturbed unless it clearly appears to be erroneous and without evidence to support it, and we urge the same grounds of error, namely:

(1.) That Judge Pardee was recused under the statute, and the decree of the circuit court of appeals is void.

(2.) That the decision of that court is clearly wrong on the merits, in that the judgment of the circuit court is clearly supported by a great preponderance of the evidence, and the circuit court of appeals has ignored and set aside the established rule of this court that a master's report of the facts will not be set aside unless clearly wrong and without evidence to support it.

I.

In support of our first ground that Judge Pardee was recused and disqualified from sitting in this case on appeal, we cite the court to section 3 of the act to establish the circuit court of appeals approved March 3, 1891, and which reads as follows:

"That no justice or judge before whom a cause or question may have been tried in the district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." (See American Construction Co. *vs.* Jacksonville, T., K. & W. R'y Co., 13 Sup. Rep., at page 764 (S. C., 148, U. S. Sup. Rep., p. 372); U. S. *vs.* Lancaster, 5 Wheat., 434; U. S. *vs.* Emholt, 105 U. S., 414.)

The opinion and record in the case at bar show that the contention in the circuit court was as to whether the order of December 4, 1886, whereby Judge Pardee placed the receiver Dillingham on the pay-rolls at $150 per month, was still in force or had been abrogated and set aside by the compromise whereby Dillingham was paid $20,000, as reported by Master Lathrop, or if not abrogated was the receiver entitled to said $150 per month under the terms of the original order made by Judge Pardee, *after he had ceased to attend to the business of the railway company?* Not only were these the main questions at circuit, but in the appeal court the subsequent orders of the court quoted in the opinion, all made by Judge Pardee, are passed on, and it is held thereunder that the receiver was entitled to continue to draw the $150 per month until he was finally discharged by the court. Indeed, Judge Pardee rendered every order in the record, including the final decree, except the particular order appealed from. Reading these orders and the opinion of the court, enforces the conclusion that the same "cause or question" in reference to Dillingham's compensation and